

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

FEB 24 1999

IN THE MATTER OF:

DOCKET NUMBER: 97-00143 (Case 3)

[REDACTED]
[REDACTED]
COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

He be considered for promotion to lieutenant colonel by a Special Selection Board (SSB) for the CY87 Lieutenant Colonel Selection Board, which convened on 30 November 1987, with his record being reviewed by the entire selection board.

APPLICANT CONTENDS THAT:

Defense Department regulations require a board to consider all eligible officers, then certify that, in the opinion of the majority of the board's members, those selected are the best qualified. The Air Force divides its board members into panels and each panel randomly reviews and scores a portion of the folder. The entire board did not review his promotion folder.

No supporting documents were provided with his application (Exhibit A).

STATEMENT OF FACTS:

The applicant was appointed a second lieutenant, Reserve of the Air Force, on 5 August 1971, augmented into the Regular Air Force on 11 September 1979, and was progressively promoted to the grade of major, effective and with a date of rank of 1 November 1983.

On 5 October 1988, the AFBCMR considered and recommended approval of applicant's request that he be reconsidered for promotion to lieutenant colonel by a Special Selection Board (SSB) for the CY 1987 (30 November 1987) Lieutenant Colonel Selection Board, with inclusion of the Meritorious Service Medal (MSM) in his selection folder. A copy of the Record of Proceedings (ROP) is appended at Exhibit C.

Applicant's OER/OPR profile, commencing with the report closing 15 April 1987, follows:

<u>Period Ending</u>	<u>Evaluation</u>
# 15 Apr 87	1-1-1
8 Dec 87	Education/Training Report
## 8 Dec 88	Meets Standards (MS)
### 6 Oct 89	MS
#### 6 Oct 90	MS

Top report at the time he was considered and nonselected for promotion to lieutenant colonel by the CY87 Central Lieutenant Colonel Board, which convened on 30 November 1987.

Top report at the time he was considered and nonselected for promotion to lieutenant colonel by the CY89 Central Lieutenant Colonel Board, which convened on 15 May 1989.

Top report at the time he was considered and nonselected for promotion to lieutenant colonel by the CY90 Central Lieutenant Colonel Board, which convened on 16 January 1990.

Top report at the time he was considered and nonselected for promotion to lieutenant colonel by the CY91 Central Lieutenant Colonel Board, which convened on 15 April 1991.

On 31 December 1991, the applicant was relieved from active duty and retired in the grade of major, effective 1 January 1992, under the provisions of AFR 35-7 (Voluntary-Retirement for Years of Service Established by Law). He had completed a total of 20 years and 28 days of active service for retirement.

AIR FORCE EVALUATION:

The Directorate of Personnel Program Management, HQ AFPC/DPPPO, stated that the applicant met the CY87 Central Lieutenant Colonel Selection Board in-the-promotion zone (IPZ) and was not selected. He also met the CY89, CY90 and CY91 Central Lieutenant Colonel Selection Boards above-the-promotion zone (APZ) and was nonselected. DPPPO stated that in January 1997, a Judge in the United States Court of Federal Claims ruled that the Air Force did not break the law by dividing its promotion boards into smaller panels (Small v. United States). The Judge concluded that they (laws) do not prohibit the service from splitting the board into smaller panels to make the decision. DPPPO indicated that Air Force legal representatives at several levels have reviewed promotion board and program procedures on several occasions through the past few years. These reviews have determined that procedures comply with applicable statutes and policy. DPPPO recommended applicant's request for promotion reconsideration by SSB be denied. A complete copy of this evaluation is appended at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

The applicant reviewed the advisory opinion and indicated that the Air Force instructions referenced by DPPPO were not followed as stated but found to be within the law by a Judge in the United States Court of Federal Claims. However, this does not change the fact that the instructions were not followed. In recent years, we have had many cases go to courts across the USA determining what is law but not what is right and wrong (Exhibit G).

ADDITIONAL AIR FORCE EVALUATION:

The Senior Attorney-Advisor, HQ AFPC/JA, stated that the applicant provides absolutely no evidence to support his request. In applicant's rebuttal response, he stated that the provisions of AFI 36-2501 cited by DPPPO "were not followed as stated but found to be within the law ... However, this does not change the fact that the instructions were not followed." JA stated that the applicant's claim is untimely. The promotion nonselections he challenges occurred in 1987-89 and he retired from active duty in 1992, yet he did not file this request until November 1996. JA indicated that what is obvious is that applicant failed to exercise the due diligence the law requires and relied instead on the actions of others to provide a basis and theory for recovery long after the statutory period for pursuing a claim had passed. JA can discern no error or injustice in this case that would warrant consideration of the application in the interest of justice.

JA stated that on the merits of the case, applicant has failed to (1) articulate a rationale as to how or why the Air Force failed to follow the applicable laws/regulations in operating its 1987 lieutenant colonel promotion board; or (2) provide any evidence whatsoever to support such a claim. The burden is on applicant to prove an error or injustice; the applicant has failed to do so. JA indicated that no provision of law exists that specifically requires each member of a promotion board to personally review and score the record of each officer being considered by the board.

For the reasons expressed in their evaluation, it is JA's opinion that this application should be denied as untimely. Moreover, as applicant has failed to prove the existence of any error or injustice warranting relief, it would not be in the interest of justice for the Board to waive the statutory time limit for filing. A complete copy of this evaluation is appended at Exhibit E.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION:

He submitted comments and additional documents that attest to the fact that the Air Force Board did not promote all of the most qualified officers. He outlines some of the contributions to the defense of the United States and our allies. Throughout his career, he was called on by the Air Staff and Major Commands to head missions related to the Philippines, Ethiopia, Sudan, Thailand, Saudi Arabia, North Korea, Panama and Turkey. He was selected only because he was one of the very best in his field. Many of these missions were classified and the events of the mission could not be written in his OERs. The disadvantage of these missions is that there is no way to receive proper credit since the details of performance cannot be spelled out. The inspection teams of PACAF, TAC, and ATC rated his performance as the best, yet, a promotion board stated that he was on the bottom of his year group. It appears somewhat contradictory. A complete copy of this response is appended at Exhibit G.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted 'all remedies provided by existing law or regulations.
 2. The application was not timely filed; however, it is in the interest of justice to excuse the failure to timely file.
 3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. The applicant's assertions concerning the statutory compliance of central selection boards are duly noted. However, we do not find these uncorroborated assertions, in and of themselves, sufficiently persuasive to override the rationale provided by the Air Force. Therefore, we agree with the opinions and recommendations of the appropriate Air Force offices and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden of establishing that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.
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THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 14 October 1998, under the provisions of AFI 36-2603:

Mr. Thomas S. Markiewicz, Panel Chair
Mr. Charles E. Bennett, Member
Ms. Martha Maust, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 26 Nov 96.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. ROP, AFBCMR Docket No. 88-01620, dated 22 Nov 88.
- Exhibit D. Letter, HQ AFPC/DPPPO, dated 28 Feb 97.
- Exhibit E. Letter, HQ AFPC/JA, dated 6 Aug 97.
- Exhibit F. Letters, SAF/MIBR, dated 31 Mar 97 and 20 Aug 97.
- Exhibit G. Letters from applicant, dated 26 Apr 97 and 15 Sep 97, w/atchs.


/ THOMAS S. MARKIEWICZ
Panel Chair